



# **Missouri Department of Natural Resources**

## **Clean Water Commission**

### **Meeting Minutes**

**January 29, 2003**

**MISSOURI CLEAN WATER COMMISSION MEETING**  
**January 29, 2003**  
**Capitol Plaza Hotel, Jefferson City, Missouri**

**MINUTES**

Present

Thomas A. Herrmann, Chairman, Missouri Clean Water Commission  
Davis D. Minton, Vice-Chairman, Missouri Clean Water Commission  
Cosette D. Kelly, Commissioner, Missouri Clean Water Commission  
Kristin M. Perry, Commissioner, Missouri Clean Water Commission

Darrell Barber, Department of Natural Resources, Jefferson City, Missouri  
Jim Belcher, Department of Natural Resources, Jefferson City, Missouri  
Dorris Bender, City of Independence, Independence, Missouri  
Robert Brundage, Mo-Ag, Princeton, Missouri  
Bill Bryan, Assistant Attorney General, Jefferson City, Missouri  
John Casey, Washington County, Potosi, Missouri  
Mary Clark, Department of Natural Resources, Jefferson City, Missouri  
Allan Clarke, Department of Natural Resources, Jefferson City, Missouri  
Randy Clarkson, Department of Natural Resources, Jefferson City, Missouri  
Norman Coates, City of Highlandville, Highlandville, Missouri  
Marie Collins, Metropolitan St. Louis Sewer District, St. Louis, Missouri  
Patrick Costello, Region VII EPA, Kansas City, Kansas  
Ann Crawford, Department of Natural Resources, Jefferson City, Missouri  
Cheryl Crisler, Region VII EPA, Kansas City, Kansas  
Aimee Davenport, Department of Natural Resources, Jefferson City, Missouri  
Glen Davidson, Allgeier, Martin & Associates, Joplin, Missouri  
Cindy DiStefano, Department of Conservation, Columbia, Missouri  
Nonie Dudley, USDA Rural Development, Columbia, Missouri  
Chris Erisman, Allgeier, Martin & Associates, Joplin, Missouri  
Doug Garrett, Department of Natural Resources, Jefferson City, Missouri  
Richard Harris, Sprenkle & Associates, Monett, Missouri  
Patrick Hawver, City of Parkville, Parkville, Missouri  
Ted Heisel, MO Coalition for the Environment, St. Louis, Missouri  
Darlene Helmig, Department of Natural Resources, Jefferson City, Missouri  
Sallie Hemenway, CDBG-DED, Jefferson City, Missouri  
Bob Hentges, Missouri Public Utility Alliance, Jefferson City, Missouri  
John Howland, Midwest Environmental, Jefferson City, Missouri  
Jim Hull, Director of Staff, Missouri Clean Water Commission  
Bill Huskerson, Sunnyslope Country Club Sewer District, Camdenton, Missouri  
Ray Ivy, City of LaPlata, LaPlata, Missouri  
Shelly Jackson, Department of Natural Resources, Jefferson City, Missouri  
David Johnson, Johnson's Stock Farm, Stockton, Missouri

Bonnie Janowiak, Department of Natural Resources, Jefferson City, Missouri  
Duane Kelly, Independence, Missouri  
Carla Klein, Sierra Club, Columbia, Missouri  
Mark Lenox, Fort Leonard Wood, Fort Leonard Wood, Missouri  
Bruce Litzsinger, Metropolitan St. Louis Sewer District, St. Louis, Missouri  
Jim Lunan, Holcim, Bloomsdale, Missouri  
Janis Melton, City of Pineville, Pineville, Missouri  
Ken Midkiff, Sierra Club, Columbia, Missouri  
Kevin Mohammadi, Department of Natural Resources, Jefferson City, Missouri  
Tom Moore, Tri-State Engineering, Joplin, Missouri  
Deborah Neff, Assistant Attorney General, Jefferson City, Missouri  
Andrew Novinger, Shaffer & Hines, Inc., Nixa, Missouri  
Emory Oliver, Washington County Public Water Supply District #1, Potosi, Missouri  
Kevin Perry, REGFORM, Jefferson City, Missouri  
Franklyn Pogge, Kansas City MO Water Services, Kansas City, Missouri  
David Potthast, Department of Natural Resources, Jefferson City, Missouri  
John Pozzo, Ameren UE, St. Louis, Missouri  
Ralph Preston, City of Blainstow, Blainstow, Missouri  
A. E. Reiss, Wichita, Kansas  
Joy Reven, Department of Natural Resources, Jefferson City, Missouri  
Tim Rickabaugh, DED, Jefferson City, Missouri  
Fritz Ritter, Lake Region Water and Sewer Company  
Phil Schroeder, Department of Natural Resources, Jefferson City, Missouri  
Carrie Schulte, Department of Natural Resources, Jefferson City, Missouri  
Stanley Schultz, Schultz Engineering, Poplar Bluff, Missouri  
Becky Shannon, Department of Natural Resources, Jefferson City, Missouri  
Shawn Singer, Department of Natural Resources, Jefferson City, Missouri  
William Smart, City of Ionia, Ionia, Missouri  
Ken Smith, Branson West, Branson West, Missouri  
Kevin Sprenkle, Sprenkle & Associates, Monett, Missouri  
Alex Stanley, Sunnyslope Country Club Sewer District, Camdenton, Missouri  
Harold Steffens, City of Ionia, Ionia, Missouri  
Dennis Stith, Shafer, Kline & Warren, Macon, Missouri  
Robert Thetge, City of Purcell, Purcell, Missouri  
D. Clark Thomas, USDA Rural Development, Columbia, Missouri  
Edmond Thomas, Gravois Arm Sewer District, Gravois Mills, Missouri  
Scott B. Totten, Department of Natural Resources, Jefferson City, Missouri  
Steve Townley, Department of Natural Resources, Jefferson City, Missouri  
Gayle Unruh, Department of Transportation, Jefferson City, Missouri  
Scott Vogler, MECO Engineering, Jefferson City, Missouri  
Diane Waidelich, Secretary, Missouri Clean Water Commission  
Ray West, Hood-Rich, Inc., Springfield, Missouri  
Bob Williamson, Water Services, Kansas City, Missouri

Linda Williamson, City of Blainstown, Blainstown, Missouri  
Scott Wrighton, City of Kirksville, Kirksville, Missouri  
Carolyn Zumalt, City of Blainstown & Ionia, Warrensburg, Missouri

Chairman Herrmann called the meeting to order and introduced Vice-Chairman Minton, Commissioners Kelly and Perry; Director of Staff Jim Hull; Secretary Diane Waidelich, and Assistant Attorney General Deborah Neff.

### **Administrative Matters**

#### **Public Hearing on Proposed Fiscal Year 2004 Clean Water State Revolving Loan Fund Intended Use Plan and State Grant and Loan Priority List**

All witnesses were sworn in by the court reporter to testify at a public hearing held on the Proposed FY 2004 Clean Water State Revolving Loan Fund Intended Use Plan and State Grant and Loan Priority List. A transcript of this hearing will be available for review at the office of the Missouri Clean Water Commission, Jefferson State Office Building, 205 Jefferson Street, Jefferson City, Missouri.

#### **Request From Highlandville to Use Recovered Funds**

Ann Crawford, Water Pollution Control Program Financial Services Section, reported staff learned that Cassville would have a recovery of funds on its phosphorus grant. When this occurred, she contacted Highlandville who has also opened bids and is short of funds on its phosphorus grant. She recommended to the community that they request approval from the commission to use the funds recovered from the Cassville project.

Highlandville obtained seven bids on its collection system and the project overall came in under bids but the phosphorus portion of the project came in high. Staff needed to cut back the community's forty percent grant from \$1 million to \$800,000 since a lot of items were ineligible for grant funds, adding to the cost for the community and other funding agencies. The phosphorus portion of the project is presently on the Intended Use Plan for \$60,000 of federal money but would qualify for \$105,000 after bids. Combined with the 25% state match, the community would be eligible for approximately \$66,000 more in federal and state match grants. Ms. Crawford stated staff supports an increase in the amount of \$66,727 combined federal and state match money. She noted the community will ask for more loan money from Rural Development to cover the ineligible costs.

Responding to Chairman Herrmann's question, Ms. Crawford stated about \$27,000 of the infrastructure money remains and Cassville will have a recovery of about \$100,000 that would be available to Highlandville.

Norman Coates, Mayor of Highlandville, reported the construction was bid at \$1,958,040 and total construction cost is \$2,516,542. Funding presently approved is \$2,379,185 leaving a need for \$137,357. Bids on phosphorus came in at \$175,000 with the engineering estimate being around \$108,000. The community applied November 11, 2001 for \$110,000 of which \$87,273 was earmarked for the community. Mayor Coates noted, even with the \$66,000, the community will be short \$70,630. The community has spent \$31,000 on ineligible costs at this time and will still be short about \$38,000. The community can make up this difference but bonds that have to be sold will raise the final user charge. The current user charge is about \$31.60 per 5,000 gallons.

Responding to Chairman Herrmann's question, Mayor Coates stated the 2000 census lists the population at 872. This is funding for phase I of Highlandville's two-phase project. The community covers a large area and has a small population.

Chairman Herrmann asked what the capacity of the treatment facility is.

Shawn Singer, Water Pollution Control Program Engineering Section, reported phase I is 70,000 gallons per day with phase I and II being 140,000 gallons per day.

Deborah Neff, Assistant Attorney General, informed the commission they cannot vote on an issue that was not on the agenda.

Mr. Townley noted bids will expire soon so that is why this matter was brought before the commission today.

Ms. Neff stated if it is an emergency situation the commission can note in the minutes they were unable to provide the 24 hour notice required under the Sunshine Law.

Mayor Coates stated bids were accepted on November 19, 2002 and will expire February 16, 2003.

Commissioner Minton moved that the commission **recognize an emergency situation for the action to be taken regarding Highlandville**; seconded by Commissioner Kelly and unanimously passed.

Commissioner Kelly moved to **accept the staff recommendation regarding Highlandville**; seconded by Commissioner Perry and unanimously passed.

#### **Adoption of November 6, 2002 Commission Meeting Minutes**

Commissioner Minton moved **to approve the minutes of the November 6, 2002 meeting** as submitted by staff; seconded by Commissioner Kelly and unanimously passed.

**Adoption of December 19, 2002 Clean Water Commission and Conservation  
Commission Joint Meeting Minutes**

Commissioner Perry moved **to approve the minutes of the December 19, 2002 joint meeting** as submitted by staff; seconded by Commissioner Minton and unanimously passed.

**Enforcement Referrals**

**Dan's Farm**

Kevin Mohammadi, Chief of the Water Pollution Control Program Enforcement Section, reported Dan's Farm in Phelps County has a 1-cell no discharge lagoon. The receiving stream for the unpermitted discharges from Dan's Farm is an unnamed tributary to Mills Creek, a losing stream. A 1.5 acre stormwater basin also discharges to this tributary. Dan's Farm is owned by Dan Kostelac and operated by Mike Kostelac. The farm currently operates as a grease reclamation facility.

Dan's Farm has been issued two Notices of Violation by the Department for operating and maintaining a water contaminant source without a Missouri State Operating Permit; causing pollution of waters of state; and exceeding effluent limits for biochemical oxygen demand and total suspended solids. Dan's Farm was previously under enforcement for discharging water contaminants without a Missouri State Operating Permit, violating effluent standards, violating water quality standards, construction of a wastewater lagoon without a permit, and causing pollution of waters of the state. On May 21, 2002 the department, the Attorney General's Office and Mr. Kostelac entered into a Settlement Agreement that required payment of a civil penalty, an upgrade of the lagoon and grease storage tank and to achieve compliance with the Missouri Clean Water Law and its implementing regulations. The civil penalty was paid on August 9, 2002, but Mr. Kostelac has yet to comply with the terms of the Settlement Agreement. To date, neither a construction permit application or an engineering report has been submitted. Both the lagoon and the grease storage tanks continue to discharge without a permit.

The department has expended a great amount of conference, conciliation and persuasion to resolve the violations of the Missouri Clean Water Law at Dan's Farm, but to no avail. Mr. Mohammadi stated it appears that further efforts to resolve the violations of the Missouri Clean Water Law occurring at Dan's Farm would be futile and recommended the matter be referred to the Office of the Attorney General.

No one was present representing Dan's Farm

Commissioner Kelly asked if Mr. Kostelac has given a reason for not complying.

Mr. Mohammadi responded staff has communicated with him numerous times but have not gotten a response.

Commissioner Minton moved to **refer Dan's Farm to the Attorney General's Office** for appropriate legal action; seconded by Commissioner Kelly and unanimously passed.

### **Johnson Stock Farm**

Mr. Mohammadi stated Johnson Stock Farm is a Class II CAFO hog operation with 750 animals that operates under a Letter of Agreement issued August 1971. The operation is located in Cedar County and is owned and operated by Mr. David Johnson. Waste from the hog pens drains into a non-discharge lagoon. The nearest receiving stream is an unclassified tributary of the Sac River.

The department's Southwest Regional Office inspected the farm on January 23, 2002 and May 3, 2002, and observed the following violations: liquid swine manure, a water contaminant, was discharged through an eroded section of the lagoon's berm, a result of inadequate operation and maintenance, into a pond northwest of the lagoon; the pond was discharging wastewater and solids into the receiving stream; hog waste was running off of the lots and pens east of the lagoon and mixing with the lagoon discharge; and the lagoon berm has trees and woody vegetation growing on it. The wastes flowed into the receiving stream, a tributary of the Sac River, and caused pollution of waters of the state.

Two Notices of Violation were issued to Mr. Johnson for: operating and maintaining a water contaminant source, which discharged water contaminants to waters of the state, without a permit; inadequate operation and maintenance resulting in a discharge; and putting and placing contaminants in a location where it is reasonably certain to cause pollution to waters of the state. In addition, wastewater from the lagoon is not being land applied in accordance with the Letter of Approval.

This facility has a history of noncompliance with the following violations having occurred in 1994: the lagoon was full and discharged into a tributary of the Sac River; the farm pond northwest of the hog lot was full of manure and discharged to a different tributary of the Sac River. In 1995 Mr. Johnson informed department staff that he was going out of business. When the farrowing house burned down, he built another one over the hill where it couldn't be seen from the road. The department assumed Mr. Johnson was out of business.

The Water Pollution Control Program has sent four letters and conducted at least one telephone call offering an out-of-court settlement to Mr. Johnson to resolve the violations of the Missouri Clean Water Law. Mr. Johnson has refused to negotiate the civil penalty.

Mr. Mohammadi recommended the matter be referred to the Office of the Attorney General.

David Johnson stated he will have only 500 hogs for market this year. He stated he was told the punitive aspect had to be settled before proceeding with trying to come into compliance. Mr. Johnson stated there has been no discharge from the lagoon since June. He noted the area has had a severe drought and hogs have been very unprofitable. He stated he would try to comply if the punitive aspect could be reasonably settled; a \$15,000 fine for someone who has 30 sows does not make sense. Mr. Johnson noted he has tried to relate to staff that \$15,000 is more than five times the market value of the whole herd. He continued he thought they had done everything they were asked to do regarding the 1994 incident. The amount of pollution that is happening needs to be put in perspective with how small the herd presently is compared to what the facilities were designed for and the fact that there has been no discharge since June.

Mr. Mohammadi provided pictures of the discharge leaving the property and going into waters of the state. He stated the matter is being recommended for referral because Mr. Johnson refuses to accept responsibility for violation of the Missouri Clean Water Law, to negotiate some sort of penalty for past violations, and to address the noncompliance at his farm.

Ms. Neff stated once a matter is referred to the Attorney General's Office a discussion of whether or not settlement is possible occurs.

Commissioner Minton noted he understands the situation of lack of revenue being generated from a hog operation but the commission has to protect the waters of the state. The department does provide ample opportunity for negotiation and suggested Mr. Johnson work with staff to develop an equitable solution and develop a plan of action for the runoff. Commissioner Minton concluded that the economics of the situation still do not permit contaminating the waters.

Mr. Mohammadi stated the matter could be referred to the Attorney General's Office contingent upon no agreement being reached in 30 days.

Mr. Johnson noted he would appreciate that if it were understood that the punitive aspect has a bearing on what he can do towards compliance. He noted it doesn't make sense for a fine to be so large that the whole operation will be in jeopardy.

Commissioner Perry noted she is concerned about the history of noncompliance and she hoped the additional 30 days gives him an opportunity to work through the issue and to realize the seriousness of complying with the clean water laws so that this matter does not come back again.

Commissioner Minton moved to **refer Johnson Stock Farm to the Office of the Attorney General contingent upon no agreement being reached within 30 days**; seconded by Commissioner Perry and unanimously passed.



### **Junction Laundry**

Mr. Mohammadi reported Junction Laundry owned by Jo Ann Wollman is located in Taney County. The wastewater treatment facility is a septic tank and recirculating sand filter with a design flow of 6,000 gallons per day. The receiving stream is an unnamed tributary of Bull Shoals Lake.

Two Notices of Violation were issued to Junction Laundry by the Southwest Regional Office in 1996 and 1998, for failure to submit discharge monitoring reports, failure to meet permit limits, caused pollution of waters of the state and failure to properly operate and maintain wastewater treatment facilities. In addition, Junction Laundry has failed to renew or pay the fees for its Missouri State Operating Permit that expired November 2001.

Water samples collected at Junction Laundry by the department on August 18, 1999, September 18, 2000, and July 17, 2001, show exceedences of the Missouri State Operating Permit limits for biological oxygen demand, non-filterable residue and fecal coliform. Discharge Monitoring Reports have not been submitted to the department as required in the permit since 1997. The above-mentioned violations are significant because they have an adverse impact on the water quality of the tributary flowing into Bull Shoals Lake.

The Water Pollution Control Program Enforcement Section has sent eleven letters and made eight phone calls offering an out-of-court settlement to the owner to resolve the violations of the Missouri Clean Water Law occurring since 1998. Ms. Wollman has refused to negotiate.

Mr. Mohammadi recommended the matter be referred to the Office of the Attorney General.

No one was present representing Junction Laundry.

Mr. Hull stated he tried to contact the owner on several occasions since he understood she was an elderly individual in ill health and did not have the ability to come up with funds. He was also unable to contact the owner's son after leaving several messages.

Commissioner Kelly moved to **refer Junction Laundry to the Office of the Attorney General for appropriate legal action**; seconded by Commissioner Minton and unanimously passed.

### **Lake Region Water and Sewer Company**

Mr. Mohammadi reported Lake Region Water and Sewer Company operates an aerated lagoon and land application system designed to serve 125 people in the Four Season's Grand Point subdivision at the Lake of the Ozarks. As the Four Seasons developments grew and additional houses were built, the aerated lagoon treatment facility was quickly overloaded. Problems with overloading were especially prevalent in the summer when occupancy of the

homes increased. Due to the increased flows, the sewer company was having trouble keeping up and was land applying wastewater at a rate greater than what the land application area could support. As a result, several inspections of the facility and the land application area revealed poor operation and pools of wastewater on the land application area and wastewater flowing from the land application area off of the property.

Fritz Ritter, the owner of Lake Region Water and Sewer (LRWS), maintained that he was going to upgrade the aerated lagoon treatment facility with a mechanical treatment plant to resolve the overloading problem. However, due to uncertainties with the possibility of sending the wastewater to the City of Lake Ozark and changes in the design and type of the upgraded plant, completion of the upgrades were unduly extended and not completed until July 2002. All the while, the existing aerated lagoon treatment facility was not being properly operated and maintained and was having problems remaining in compliance. Three Notices of Violation were issued for failure to properly operate and maintain the system, discharge without a permit, and failure to submit discharge monitoring reports. Due to these ongoing problems, this facility was referred for enforcement action in May 2002 because the existing treatment facility had not been upgraded and the summer season was approaching.

Shortly after the enforcement section received the enforcement request for LRWS, an enforcement action request was received for the Punta Piloto development at Four Seasons Lakesites. This matter was referred to the Office of the Attorney General for a possible criminal investigation. The Attorney General's Office feels that the Four Seasons Lakesites matter and the LRWS matter are intertwined and wants to pursue resolution of both matters through a joint agreement.

Currently, LRWS has constructed a new mechanical treatment facility to handle flows from the Four Seasons development and has taken the overloaded land application system offline. In order to pursue a joint resolution of these matters, Mr. Mohammadi recommended a referral of this matter to the Attorney General's Office as per the request from that office.

Fritz Ritter, LRWS, reviewed a May 24, 2002 letter from the Department of Natural Resources relating to three violations.

Chairman Herrmann noted surface water is prohibited from entering the lagoon by regulation so the rainfall causing the lagoon to be full is only that rainfall that fell directly on the lagoon, not surface water running into the lagoon. He asked if an inspection is done before hookup of new homes to the system.

Mr. Ritter acknowledged an inspection is conducted.

Chairman Herrmann asked if basement drains, downspouts and so forth are excluded from connection to the sewer system.

Mr. Ritter replied they are prohibited by mandate from the water and sewer company to the homeowners.

Chairman Herrmann asked if that is covered in the inspection before hookups are completed.

Mr. Ritter acknowledged it is.

Chairman Herrmann stated the information being presented should be considered by the Attorney General's Office. The commission's referral to the Attorney General's Office is to seek concurrence and compliance and not necessarily the commission's concurrence with the staff's or Mr. Ritter's recommendation.

Mr. Ritter stated he believes the Clean Water Commission won't agree with DNR's recommendation to refer the matter to the Attorney General's Office after his presentation is completed. He continued that he has spent an extraordinary amount of money over a three-year period to build a treatment plant during which it took months to get comment letters back after submitting plans to DNR. Mr. Ritter stated after the commission knows how his company has improved the water and sewer at the Lake of the Ozarks he believes the matter will not be referred for civil penalties. He continued that every violation is a moot point because he has constructed a sewage treatment facility costing over \$400,000 that is operational and permitted for 100,000 gallons per day. It is currently operating at about 20,000 gallons per day.

Chairman Herrmann stated the civil penalties are outside the purview of the commission.

Mr. Mohammadi stated Mr. Ritter agrees that the two matters are intertwined.

Mr. Ritter stated he does not agree.

Mr. Mohammadi stated staff is asking for referral of the matter because in the past LRWS could not keep up with the capacity for the Four Seasons development and that's why the two issues are intertwined. Mr. Mohammadi noted civil penalties are not the issue. It is believed that the two issues have to be settled at the same time in order to prevent Four Seasons developing without capacity and LRWS not having adequate capacity. Mr. Mohammadi stated Four Seasons is the sole customer of LRWS.

Mr. Ritter stated Four Seasons is not LRWS's only customer. Three years elapsed and over \$60,000 was spent on engineering fees before a permit was issued to build a treatment plant. Mr. Ritter asked why DNR wants an agreement between LRWS and Four Seasons. He continued that LRWS has capacity and asked why they are asking for a referral to the Attorney General's Office, which opens him up for civil liabilities. Mr. Ritter stated he spoke to DNR staff yesterday and was told he could be fined up to \$5,000. Mr. Ritter stated there is no relationship between Four Seasons and LRWS. Punta Piloto received a NOV for building sewer structures without a permit after LRWS received a NOV. Mr. Ritter stated DNR has

held up the permit on Punta Piloto because they submitted plans to push additional effluent through a line that was not designed for it and he protested that his system would be overloaded. He stated he has problems due to the May 24, 2002 letter from DNR which is bogus and not relevant. Mr. Ritter explained a problem he had with his testing laboratory not providing information that was required by DNR.

Chairman Herrmann stated the fact that his testing laboratory disagreed with the department's regulations has no relevance.

Mr. Ritter replied that he considers this to be a very minor infraction. Someone made an error and it was corrected after a time. He asked why that would warrant a civil penalty. Mr. Ritter further explained the NOV contained violations of the permit limits for total suspended solids when his permit did not contain a daily maximum.

Mr. Mohammadi stated staff will look into this to determine if this occurred and the NOV could be rescinded. He asked why Mr. Ritter has waited until now to raise this issue with the department.

Mr. Ritter responded he calls DNR any time something happens and during the three years he has been involved in this business he has not been able to get answers, solutions, or resolution. When he called about this issue, DNR staff told him they wanted to make sure he was going to build the treatment plant. He asked if he was going to get fined and staff responded he would not. He asked why when the NOVs were received on November 4, he heard from DNR just last Thursday that he was in violation and looking at civil penalties. Mr. Ritter provided a timeline of events.

Chairman Herrmann stated Mr. Ritter's principal objection is to any kind of a fine that might grow out of the conference, conciliation and persuasion that staff is required to conduct. The dollar amount is not within the control of the commission. If the matter is referred, the Attorney General's Office must determine if a fine is appropriate.

Mr. Ritter responded the lagoon does not function as a lagoon. State law says an administrative penalty shall not be imposed until the director has sought to resolve the violation through conference, conciliation, and persuasion. Mr. Ritter stated on every one of the items proposed today for referral the agenda states that further efforts to resolve the violations of the Missouri Clean Water Law would be unsuccessful.

Chairman Herrmann stated that constitutes conference, conciliation and persuasion.

Mr. Ritter responded he has never had a conference of conciliation and persuasion with DNR on settling this. The law also says no administrative penalties shall be assessed. Everything has been resolved because the lagoon no longer functions. Mr. Ritter asked how something can be referred to the Attorney General's Office with a possibility for civil penalties when DNR has not followed the law.

Mr. Mohammadi stated staff is not seeking administrative penalties. If that were the case, it would have been issued as a formal action subject to appeal. Staff just wants to have the Four Seasons, LRWS, who solely provides service to Four Seasons, come to some kind of joint settlement agreement to make sure that Four Seasons does not develop any more land without making sure LRWS has enough capacity. Mr. Mohammadi concluded that LRWS needs to commit that they will keep up with capacity as Four Seasons grows.

Mr. Ritter stated he recommended to the Attorney General's Office last July that when his plant reaches 75% capacity he will sign something that says he will expand the plant by a certain date. He stated he has no ties with Four Seasons and they aren't the best of friends. If the matter is referred, it opens him up to civil liabilities. If he can get something that says DNR will not impose any civil liabilities, he will do whatever he can to make something work.

Chairman Herrmann asked if further conference, conciliation and persuasion can occur.

Commissioner Perry noted she is very concerned that this is a back door way to join a party to another legal agreement. She continued that the delays mentioned in Mr. Ritter's time line is in line with the phone calls she gets on a regular basis regarding frustration of working with the department and that the commissioners have of not getting phone calls returned. Commissioner Perry asked if the issues can be resolved and why this method was used to get to one party in a settlement with another. She asked if Mr. Ritter has any interest in the other entity.

Mr. Ritter replied he has an interest in the other entity in that they are forced to use LRWS for their potable water and wastewater treatment. He continued they are his largest customer but not his only customer.

Commissioner Perry asked if the burden is not on Four Seasons to make sure that they are not exceeding the capacity of the LRWS system. She asked if violations that may not be significant are being used as a back door approach to bring another party in to assure that's all done properly.

Mr. Mohammadi responded if LRWS were not connected to Four Seasons development, and if the department did not have the problem of Four Seasons developing prior to making sure there is capacity available to them, there would not be a request for referral of LRWS.

Commissioner Perry asked how much of that problem is reflected in the fact that they spent three years trying to work with the department.

Randy Clarkson, Chief of the Water Pollution Control Program Engineering Section, informed the commission it was desirable to regionalize which has delayed the process. He continued LRWS changed their plans numerous times and any suggestion that the three-year delay relates to the department is not accurate.

Commissioner Minton noted the issue before the commission is that the department wants a joint resolution to expansion versus ability to treat the water going into the facility. He continued that Mr. Ritter had stated earlier that he was willing to come to an agreement that the construction of new facilities to accommodate any new construction would begin when 75% of capacity was reached. Commissioner Minton asked if resolution about the connection and protection of those waters via Four Seasons, or any other development in that area, can be reached if more time is given before actually referring.

Mr. Mohammadi responded Four Seasons originally owned LRWS and there is a possibility that they will decide to take the company back in order to be in control of their development.

Mr. Ritter stated he will sign an agreement if that is what the Attorney General's Office wants. If Four Seasons would again acquire LRWS they would also be bound by that same agreement because that would be part of the company. Mr. Ritter stated he doesn't know why he has to be subject to any civil litigation for costs associated with what DNR wants to do. He continued he will do everything in his power to accommodate DNR.

Mr. Mohammadi responded possibly the parties can work this out during the next 30 days. If it can't be resolved, it can be brought back to the commission. Responding to Mr. Ritter's comments about delays by the department, Mr. Mohammadi read from a June 2002 letter to Mr. Ritter stating that the department received Mr. Ritter's request for a 30-day extension of the construction permit. The department granted the extension and advised Mr. Ritter that completion of the treatment plant upgrade should be completed as soon as possible.

Mr. Ritter responded that letter relates to a construction permit for a 100,000 gallons per day sewage treatment plant. He stated he received the permit to begin building the treatment plant May 24, 2002 which allowed 30 days to build a circular, mechanical clarifier. Mr. Ritter noted he asked for an extension after receipt of this letter and on July 5, 2002 the plant was operational.

Commissioner Perry asked if the NOV was received at the time of the severe flood.

Mr. Ritter stated it was.

Commissioner Minton moved to **extend negotiation of this issue to the February 26, 2003** commission meeting; seconded by Commissioner Perry and unanimously passed.

Commissioner Perry stated there was a suggestion to approach the Clean Water Commission in the timeline that Mr. Ritter provided. The statement in the timeline is that Randy Clarkson advised Mr. Ritter that he would be wasting his time. She asked what that statement was about.

Mr. Clarkson reported the City of Laurie has a project with Rural Development and there was a technical possibility of bringing Laurie to Shawnee Bend and across the bridge into the regional treatment plant. The department worked with local people to determine if a regional concept could be developed and it did not work out. At the time this occurred, Laurie was already a project moving forward and there didn't seem to be any feasibility from several standpoints. The commission didn't have a way to facilitate this.

Mr. Ritter noted this was a poor choice of words on his part and it was not a quote. He continued that prior to that period of time, the utility company was looking at an interim plant because they wanted to get all the effluent across the lake to where another plant wouldn't have to be built. DNR permitted a small plant but then it was realized this was a waste of money because it would soon be too small because the bridge crossing was not going to happen. The company then had to switch to a bigger plant.

Commissioner Minton moved to **go into closed session** at approximately 1:15 p.m. to discuss legal, confidential, or privileged matters under section 610.021(1), RSMo; personnel actions under Section 610.021(3), RSMo; personnel records or applications under Section 610.021(13), RSMo or records under Section 610.021(14), RSMo which are otherwise protected from disclosure by law; seconded by Commissioner Perry and unanimously passed.

Commissioner Minton moved to **go back into open session** at approximately 3:15 p.m.; seconded by Commissioner Perry and unanimously passed.

#### **Anschutz Mining Corporation Variance Request**

Ms. Neff reported Anschutz Mining Corporation filed a variance request regarding certain conditions of its operating permit. The attorney for Anschutz, the department, and the Attorney General's Office have discussed the issue and agreed to have further meetings to work out the issues. Ms. Neff stated the variance will not go forward at this time. Anschutz will provide written notice to the department that they want to move forward with the variance if the parties cannot come to agreement. The timeframes under the statute will begin at that time.

#### **COE Appeal of 401 Water Quality Certification Denial for the St. John's Bayou/New Madrid Levee Project**

Scott Totten, Director of the Water Protection and Soil Conservation Division, reported the certification for the project was denied on November 18, 2002. The department had issues that still had not been addressed at that time and the certification could not be issued. Issues related to Big Oak Tree State Park and the number of acres that needed to be mitigated. The COE provided a draft Memorandum of Agreement on the protection of Big Oak Tree State Park on December 6, 2002 and the department responded on January 9, 2003. An appeal of the department's decision was filed by the COE on December 10, 2002. The commission

secretary will request that the Administrative Hearing Commission serve as hearing officer. Mr. Totten asked for the commission's approval to continue to try to settle with the COE. He continued that the department believes opportunities still exist to settle since there has been some movement on Big Oak Tree State Park.

Commissioner Perry asked if the department has been meeting with the COE.

Mr. Totten replied he is not aware of any meetings since November 15 when a meeting was held with the Fish & Wildlife Service and the COE. There have been some phone conversations between department counsel and COE counsel and there has been some correspondence and e-mail communication. A meeting was held with some representatives of the local sponsors so they would have an understanding of the remaining issues.

Commissioner Perry asked if there were no COE staff present at that meeting.

Mr. Totten replied there were no COE representatives present. He continued he understands the COE is willing to have discussions but have yet to see what those might be.

Commissioner Minton asked if the COE did file an appeal.

Mr. Totten replied they filed an appeal. The last correspondence from the COE is dated January 27, 2003 where they reaffirmed their commitment to fully mitigating the project impacts commensurate with construction. They will not operate the project until mitigation is complete. Mr. Totten noted the COE feels it's important to continue moving forward with the appeals process.

Commissioner Minton asked if a hearing officer has been assigned yet.

Mr. Totten replied one has not yet been assigned.

Commissioner Minton asked if the commission will still hear this appeal if resolution is not reached in light of the 401 certification dilemmas that have occurred recently.

Mr. Totten acknowledged the commission will hear the matter if it goes to hearing.

Commissioner Perry asked if resolution is actively being pursued.

Mr. Totten stated the department was asked to reaffirm its position, which it has done, and is now waiting for the COE to provide some alternatives.

Commissioner Minton asked if agreement has been reached on the Memorandum of Agreement.



Mr. Totten replied agreement has not been reached. The COE indicated an interest in putting together a Memorandum of Agreement the day before the certification was due to be issued but it was not drafted until after the denial was issued. One of the reasons the COE wants to do this is because they will commit in the Record of Decision for the project. Before certification is issued, the department needs to see this as part of the mitigation for the project because Big Oak Tree State Park will be impacted by this. There needs to be some commitment from the COE that there will be mitigation for Big Oak Tree State Park.

Ms. Neff stated the issues should not be discussed any further because this issue is under appeal.

Mr. Totten noted they are the points the department made in the comment letters since 1999.

### **Administrative Appeal Procedure**

Melissa Manda, counsel for the Department of Natural Resources, reported the Administrative Hearing Commission (AHC) is available to hear matters that have been appealed to the Clean Water Commission and make recommended decisions to the commission for final resolution. The department has recommended making use of the Administrative Hearing Commission to the various boards and commissions throughout the department and asked for any input or concerns the commission may have regarding the process.

Ms. Manda explained the AHC is a professional administrative forum for the State of Missouri. The AHC is required by statute to hear and decide cases involving the Department of Revenue and Public Safety. Ms. Manda stated the department is interested in providing clarity and consistency in the process of administrative procedures. There are many different citizen commissions available to hear concerns of the citizens but they also may have varying processes on how administrative appeals are processed.

Ms. Manda continued the state has significant budget issues and the AHC processes appeals at a lower cost with a high professional level of expertise. The presiding commissioner is Karen Winn and the two other commissioners are Chris Graham and June Doughty. The department has a Memorandum of Understanding with the AHC that sets fees that they charge. Ms. Manda explained the AHC charges \$85 an hour which is what the current hearing officers are paid but they have lower costs for paralegals and legal counsel they hire in order to do some of the work necessary in processing an appeal. They are located in the Truman State Office Building and have court reporters on staff and courtrooms are available. Ms. Manda concluded the lower costs, their high professionalism, and their familiarity with administrative law lead to the department's recommendation to the boards and commissions to make use of the AHC. The department is also looking at incorporating some performance goals in the Memorandum of Understanding.

Chairman Herrmann noted the commission is not willing to give up making decisions. The present system has the commission appointing a hearing officer and that individual comes back to the commission with a recommendation. The commission may or may not follow the hearing officer's recommendation. A hearing officer is used because it is a legal proceeding and the commission wants to make sure it is done properly. The final decision is left to the commission.

Ms. Manda responded the commission is obligated by statute to make the decisions.

Chairman Herrmann noted the presently introduced legislation does not provide for this.

Ms. Neff stated Ms. Manda is talking about using the AHC as another hearing officer who would report back to the commission for the commission to make a decision.

Chairman Herrmann stated that is the responsibility the commission believes it should retain.

Ms. Neff stated that responsibility will be retained through this process. She explained presently when an appeal is received the commission's secretary provides the appeal to the commission counsel to review for time or jurisdictional issues, commission counsel then returns to the secretary who sends a letter to the appellant acknowledging receipt of the appeal and advising that a hearing officer will be appointed. A hearing officer is appointed on a rotating basis. Ms. Neff asked for direction on adding the AHC as one of the hearing officers available to the commission or to use them whenever available.

Ms. Manda noted this is a secondary issue to the primary issue of who the commission wants to hire as their hearing officer. Using the AHC would allow consistency department-wide. Recommendations might be for the commission to appoint hearing officers as appeals come in without further involvement by the commission or the commission may want to consider giving the appellants the ability to come to the next commission meeting to give them an opportunity to discuss it or otherwise at that point make the decision to forward the appeal to a hearing officer.

Commissioner Minton asked if the other boards and commissions also have independent hearing officers.

Ms. Manda responded the department has had a group of hearing officers for all commissions to choose from. One concern is that this is at a very low dollar amount compared to what hourly fee an attorney might recover from other clients, sometimes adding to the issue of timeliness. Hearing officers do also provide a service to the department when holding public meetings where an independent attorney is needed to run the meeting.

Responding to Commissioner Perry's question, Ms. Manda stated each one of the hearing commissioners would act independently in terms of holding a hearing, adducing evidence, making rulings on motions that come before them, and setting schedules for when matters might be completed.

Commissioner Perry asked if they would communicate with the commission and make their recommendation to the commission in the same manner as past hearing officers have.

Ms. Manda acknowledged that would be the process.

Chairman Herrmann stated if the capability of the three hearing commissioners is exceeded at any one time, the commission still has the opportunity to contract with the hearing officers it presently uses.

Ms. Manda stated that is correct and it should be a win-win situation with the decision being the commission's. The AHC does not anticipate requiring any additional resources to handle the load of administrative appeals the department has.

Chairman Herrmann noted there are a number of commissions who presently use the AHC.

Ms. Manda noted there is nothing binding the commission to this process. The commission has the opportunity to review appeals at its next meeting in order to make the determination of whether to send appeals to the AHC. It's the department's recommendation to use the AHC since it is in the best interest of the state to have a very consistent process even though there are several different types of boards and commissions with independent statutes.

Chairman Herrmann asked if the commission has to authorize this procedure.

Commissioner Perry noted in the past the Chairman has appointed the hearing officer and this just makes another choice available. She noted she would feel comfortable with the chairman continuing to make that decision rather than having a blanket procedure.

Ms. Neff stated the charge to the commission secretary is to find an available hearing officer and to provide an appointment letter to Chairman Herrmann to sign.

Commissioner Perry noted this would just be putting the three Administrative Hearing Commission members at the top of the list of available hearing officers.

Ms. Neff asked if the commission wants to give preference to using the AHC so the secretary will check with them first.

Chairman Herrmann indicated that should be done.

Mr. Hull noted the other issue is if the secretary continues to process the appeals when they are received or if they should be brought to the next commission meeting.

Ms. Neff stated she could provide a list of the steps in the ordinary process and if there is ever a request to deviate from that practice they could just come to the commission and make a request. The regular practice would be to go to the AHC first. If the AHC is not available, the secretary will check with the other hearing officers. The secretary then provides the appointment letter to the Chairman for signature.

Commissioner Perry asked who appoints the commissioners on the AHC.

Ms. Manda replied the Governor appoints those individuals who serve for a specific amount of time with the advice and consent of the Senate.

Commissioner Perry stated this process would vary from the proposal by Senator Steelman in that the hearing commission would make a recommendation to the commission.

Ms. Manda noted there are several legislative proposals, one of which would authorize the AHC to make final determinations of appeals. She asked that the commissioners let her know of any concerns or suggestions regarding the Memorandum of Agreement with the AHC. The Memorandum of Agreement is similar to the contracts the department has with the individual hearing officers to establish fees.

Commissioner Perry moved that **when an appeal is filed with the commission, the normal procedure of the Clean Water Commission is that the secretary first request the availability of the Administrative Hearing Commission to serve as hearing officer. If the Administrative Hearing Commission cannot serve as hearing officer, the secretary should request the availability of one of the attorneys previously used by the commission as a hearing officer. The commission understands that a party might request a different procedure that the commission will consider when and if that occurs. The Administrative Hearing Commission will make Findings of Fact, Conclusions of Law and recommendation as to the outcome of the case to the commission for the commission's action.** Motion was seconded by Commissioner Minton and unanimously passed.

#### **401 Water Quality Certification Issues**

Becky Shannon, Acting Chief of the Water Pollution Control Program Planning Section, reported the Corps of Engineers (COE) rejected the department's general conditions for nationwide permits in Missouri in May 2002. No nationwide permits are currently effective in Missouri and staff has been issuing these certifications through individual certifications since that time. Staff asked the COE if they would consider resubmittal of those conditions. The COE agreed to this and staff has been working with them to revise the conditions to

address their concerns when appropriate and still be protective of water quality. Staff submitted these draft conditions informally to the COE. Ms. Shannon stated comments have now been received from the COE and she is hopeful staff can resubmit the general conditions for the nationwide permits for acceptance by the COE in order to get nationwide permits back in Missouri.

Chairman Herrmann asked what level of the COE staff is dealing with.

Ms. Shannon replied there are five districts and three divisions of the COE that Missouri deals with. One individual has been appointed in the Kansas City District Office to be the lead in coordinating with Missouri. This individual received input from the other districts and divisions. Ms. Shannon continued that there are still some nationwide permits staff does not believe they can condition in a way that the COE will accept and still be protective of water quality in Missouri.

Mr. Hull noted staff's goal is to work out as many as possible.

Commissioner Minton asked if staff believes approval will be achieved by the next commission meeting.

Ms. Shannon responded she believes staff will have formally submitted them to the COE by the next meeting.

Commissioner Minton asked if the commission can see the submittal and the responses the COE provides. If Missouri wants to condition in a manner the COE isn't willing to accept, Commissioner Minton asked for a comparison of what the COE anticipates.

Ms. Shannon stated that can be done. She continued that when the COE responded in May, they did not inform staff what specific objections they had. Staff understands there were some of the permits at that time where the COE considered the conditions to be acceptable but they denied the entire package. Ms. Shannon asked if the commission wants this information before it is formally submitted to the COE.

Commissioner Minton replied if staff has them.

Commissioner Perry asked for an update at the next meeting.

Chairman Herrmann stated one of the contentious points of 401 is mitigation and Missouri has mitigation guidelines that are not promulgated as regulation. He asked how an applicant is to know what to do until he applies. Chairman Herrmann asked why Missouri's mitigation guidelines are not consistent with the COE mitigation guidelines and why the commission was not given an opportunity to see what's involved and what kind of consistency there is in the guidelines.

Ms. Shannon replied her lack of history prohibits her from answering all of those questions. Missouri's aquatic mitigation guidelines are published on the department's website, are provided to all applicants for 401 certification, and to the COE for distribution so that anybody who is looking at doing a project that would require mitigation can see what those guidelines are. Ms. Shannon explained the guidelines are explicit in what the priorities should be in terms of guidelines.

Chairman Herrmann asked why the guidelines are not a Clean Water Commission regulation.

Ms. Shannon replied the guidelines were not initially put forward as a regulation. Staff has discussed this and recognizes the need for it but have not made it a priority.

Commissioner Minton moved that the **department move toward promulgation of rules for the methodology by which 401 certification is issued, specifically addressing the aquatic resource guidelines**; seconded by Commissioner Perry and unanimously passed.

Mr. Hull stated there are some other topics that need to be clarified in rule also.

Ms. Shannon noted there is activity at the federal level regarding wetlands and staff is presently developing a briefing paper on this issue. A regulatory guidance letter developed by the COE does affect the way wetlands are determined and it will affect the work staff does.

Chairman Herrmann noted wetlands are only one piece of the mitigation guidelines.

Ms. Shannon reported staff has been in the process of revising the rule to clarify it and address issues previously raised by the commission. Staff had not intended to include the aquatic resource mitigation guidelines but will now look at that. Staff is looking at the rule to see if there is anything in it that would make it work better to transfer the 401 program to EPA in light of the potential for loss of staff for this effort on June 30.

Commissioner Minton asked if the commission has to approve the nationwide permits.

Ms. Shannon replied the commission has not approved them in the past.

Commissioner Minton asked if the commission needs to review and vote on the permits that are submitted to the COE.

Ms. Shannon replied these are actually conditions just as are done now with each one of the applications that are received. Staff is offering to the COE general conditions that would apply to all projects that fit under their nationwide permits. The COE then makes the conditions part of their permit.

Commissioner Minton asked if the commission needs to approve the conditions that are ultimately submitted to the COE for their permits.

Ms. Shannon replied the commission has not been involved in this certification process.

Commissioner Perry asked if it made sense for the commission to be involved since the commission is involved in the appeal process.

Chairman Hermann stated the nationwide permit would expedite the 404 considerations of the COE in that if they have a nationwide permit for that particular project it goes into the 404 for consideration immediately.

Commissioner Perry asked if that would never be appealed to the commission.

Commissioner Minton replied that is correct.

Ms. Shannon noted because the COE would have accepted Missouri's conditions as part of their permit, the COE would be the party who is appealed to.

Mr. Hull stated the COE has to enforce whatever conditions they put in their permits. He continued that if the commission wants to review these conditions and help support them, that might be a plus in gaining COE acceptance of these conditions.

Commissioner Minton asked the meeting attendees if they wanted the commission to review the conditions for the nationwide permits submitted to the COE. After acknowledgement from several that they would like to see this, Commissioner Minton asked that the commission review the conditions for the nationwide permits before they are submitted to the COE.

Commissioner Minton asked if the 401 program is funded until the end of the fiscal year and asked what occurs at that time.

Mr. Totten replied there is an annual work planning process with EPA that will begin in early March to discuss how the department proposes to prioritize the funding EPA provides annually to run the Water Pollution Control Program. The department expects that EPA will allow prioritization of three FTEs worth of funds out of the NPDES grant to continue doing the 401 work after July 1.

Commissioner Minton stated he has reviewed the budget cutbacks and noted he recalls a figure of \$560,000 that was to be given back to General Revenue from fee-based permit collections. He asked where the authority to do this comes from since the law says that the money has to be spent on the program.

Mr. Totten responded there was \$560,000 of the water pollution control permit fee fund that was returned to pay back a general revenue bridge loan that occurred several years ago. \$1,060,000 was transferred from general revenue into the fund to allow continued funding of staff until such time as a new fee bill went into effect in 2000.

Commissioner Minton asked if it was understood that the money was to be paid back since the fee bill doesn't address this.

Mr. Totten stated a memorandum from the Office of Administration dated January 10, 2003 requests transfers to the general revenue fund of \$560,000 from the Natural Resources Protection and Water Pollution Fee Subaccount along with some funds from Mental Health, federal funds and an intergovernmental transfer from another fund.

Commissioner Minton asked if that letter said the commission has the authority to give that money back after it was collected for fees. He continued that the fee bill specifically said how the money had to be spent.

Mr. Totten noted the contention is that the one million dollars was a loan and, that at such time as the fees were generated to pay back the loan, we would keep the general revenue.

Commissioner Perry asked where that is written because the commission has some authority in the fee bill. She continued that money is being given back to pay an old loan that she does not believe the fee bill authorized that those fee funds could be used to pay back.

Mr. Totten replied \$500,000 was removed last year to fund other general revenue funded programs in the state.

Commissioner Perry stated it may not have been appropriated legally last year either.

Mr. Totten noted he understands the commission's concerns.

Commissioner Perry asked for a legal opinion showing the statute that says where that can be done.

Mr. Totten noted division counsel will look at this.

Commissioner Minton asked what happens if someone who has paid their fee wants to bring issue with this.

Commissioner Perry noted there are many who could have standing.

Robert Brundage, MoAg Industries, concurred that there is no authority in the statute for anyone to transfer the money back. He continued that he participated in the water permit fee workgroup that worked extensively on the legislation that increased the fees. At no time



during that process was there any mention of paying the money back in the future. Mr. Brundage stated it is his opinion that the General Assembly saw the transfer as an appropriate use of state funds to help the department. It was a decision the General Assembly made at that time to help support a worthy program. Industry came forward and agreed to increase fees because they know the value of the Water Pollution Control Program, the value of receiving permits, and protecting Missouri's water. Mr. Brundage stated today is the first time he's heard of this and it's very disturbing that there was \$500,000 taken out of the fee fund last year and asked why the commission wasn't told about this when it occurred. Mr. Brundage noted when the fee bill was passed, it was designed to bring in more money than the Water Pollution Control Program needed at the time to run the program. The fee bill runs through 2007 and with inflation there will be increased costs that have to be addressed. Since over one million dollars has been taken from the account, that program could potentially go bankrupt before 2007. The department will then have to ask for more money and a fee increase will again become an issue. Mr. Brundage noted, without any type of agreement, it's wrong and he believes it's illegal and asked that the commission take whatever action they can to prevent this from happening.

Ken Midkiff, Ozark Chapter of the Sierra Club, stated he agrees completely with Robert and this is nothing more than a raid on the permit fees. He stated the \$1,060,000 that went to the Department of Natural Resources was viewed as a one-time, general revenue shot. There was no mention in the legislation about paying back; it was not a loan but a grant of general revenue funds to the department. Mr. Midkiff noted maybe there was a side agreement but that is not mentioned in the legislation. He concluded that the statutory language says solely for the use of the Water Pollution Control Program.

Commissioner Perry asked what a bridge loan is.

Mr. Totten replied there have been several different shots at general revenue in different funds over the years and it was always called a bridge loan. A fee bill had been approved but fees had not yet been collected and money was short. It was called a bridge loan in terms of discussion with the legislative budget committees. The expectation was that, after you start getting funds back, you will pay it back. Mr. Totten stated even in other cases where it was called a bridge loan with the appropriations committees it may have never been paid back; bridge loan may just be a term that is used internally.

Mr. Midkiff stated there was an original request from the department of \$2.6 million and \$1 million went to the Department of Agriculture. He noted he would be interested to know if the Department of Agriculture is going to have to pay back their amount.

Mr. Totten said there were two loans for water pollution. In 1998 there was \$1.4 million and in 1999 there was \$1,060,000.

Commissioner Perry noted the commission is very interested in seeing the documentation showing something other than the statute that says quite clearly the word solely for the use of those programs. She stated the commission wants to see something that overrides the statutory language otherwise this may be unconstitutional which is not where the commission wants to go.

Commissioner Minton stated this is to make sure sufficient staff is available to protect the waters of the state.

Chairman Herrmann asked for definitive answers for the commission.

## **Other**

### **Watershed Coordination**

Commissioner Perry noted there is some effort being undertaken in watershed mapping and the commission asked for an update at each meeting on progress made toward statewide watershed coordination. She asked for this to be included on the February agenda.

### **319 Grants**

Commissioner Perry asked at what point the 319 grants will come before the commission for approval.

Ms. Shannon replied 22 applications were received for 319 grants and will be brought to the commission's February 26 meeting for review and approval. The broadening of 319 applicability this year is the result of an action taken by Congress in November that said during FY 2003, 319 monies could be used to fund projects implementing Phase II storm water permits. Ms. Shannon noted this is significant because typically it is very explicit with the 319 grants that anything that's required by permit is considered a point source and can't be funded by 319. Many of the Phase II storm water activities really address nonpoint source type issues but, because they were to be covered by a Phase II permit, no longer could be eligible for 319. In Missouri there have been very few applications for 319 money to address this kind of issue. Ms. Shannon stated there would be some interest in that from the communities if the flexibility were given to use 319 more broadly.

Commissioner Perry asked if the current projects coming before the commission are FY03 and if any will be for Phase II storm water.

Ms. Shannon noted they are FY03 and there will not be any for Phase II because the applications were due in early November and the bill was passed by Congress in late November. Staff does not know how much 319 money there is at this time. Ms. Shannon stated there may still be some ability to look at the 319 money with some flexibility.

Commissioner Perry asked if staff will recommend a priority list for the projects until funding is known.

Ms. Shannon replied that is correct.

### **Status of EPA Final Concentrated Animal Feeding Operations Rule**

Randy Kixmiller, Water Pollution Control Program Engineering Section, reported the program has been reviewing and evaluating the final Concentrated Animal Feeding Operations (CAFO) rule since last December. EPA anticipates publishing the rule in the *Federal Register* sometime in February. The first phase of the education effort was the University of Missouri's Commercial Agriculture Program publication of a condensed version of the rule concentrating on how this rule will affect Missouri's program. The Commercial Agriculture Program worked with the Department of Natural Resources to publish this document. The second phase consisted of six meetings held throughout the state. Others included in this effort were the Department of Agriculture, the Environmental Protection Agency, and the University. Mr. Kixmiller noted these meetings were well attended and fairly successful.

Mr. Kixmiller stated it appears the final rule won't be as significant in Missouri as it will be in other states. There are presently about 420 CAFO permits. EPA estimates over 4,000 current permits for CAFOs within the US and estimates this final rule will require about 15,000 permits.

Chairman Herrmann asked if that is comparable to what Missouri permits.

Mr. Kixmiller responded other states have differing requirements. Missouri has been fairly consistent with what has come out in the final rule and what EPA's position has been in the past as far as permitting large operations.

Staff estimates less than six additional permits coming in as a result of the final rule because of the numbers of nursery swine.

The department would like to convene a workgroup consisting of producers, citizens' groups, and other departments and stakeholders that would be involved and affected by the rules. This workgroup would evaluate the changes that will be undertaken as a result of the rule. Mr. Kixmiller stated these recommendations will then be presented to the commission prior to proposing changes to the commission rule.

Mr. Kixmiller described the differences between the commission's current CAFO rule and what's in the final EPA rule:

- The animal unit designation has been abandoned. This is used throughout the statute and rule.
- The mixed animal calculation has been abandoned. Where operations had two different types of animals, staff would combine those animals to determine the threshold that would require a permit.
- Includes veal and ducks. Staff did not specifically list veal and ducks although the ability exists to designate them on the basis of equivalent animal units.
- The chicken numbers in the final rule are based on wet or dry systems. The Missouri numbers don't differentiate between the two.
- Requires a permit for 10,000 swine under 55 pounds. The current Missouri rule is 15,000. This has the possibility of bringing in some additional permits.
- The broiler threshold for the dry systems in the final rule is 125,000. Missouri's current requirement is 100,000 to require a permit.

Commissioner Perry asked if the workgroup will review the existing rule to make sure it comes into compliance with EPA's final rule.

Mr. Kixmiller responded there are some items that will have to be changed like the nursery swine threshold being lowered. Missouri has to be at least as stringent as EPA's rule in order to have delegation to operate the program.

Commissioner Perry asked when the proposed rule changes can be ready.

Mr. Kixmiller replied EPA's final rule becomes effective 60 days after it is published in the *Federal Register*. Missouri has one year after that date to make the changes if the changes only require regulation changes. If changes to legislation are needed, Missouri has two years to bring the program into compliance.

Chairman Herrmann noted federal regulations are going to abandon the animal unit designation. He asked if the use of animal units to determine class size in Missouri would necessitate a change.

Mr. Kixmiller replied EPA decided to go to something that they felt was simpler for the producer to understand. They included the animal numbers in the regulation rather than using the animal units. Mr. Kixmiller continued EPA did not feel that this was a stringency problem. They had to abandon the mixed calculation in trade off with abandoning the animal unit.

- Added the no potential to discharge exception. An operation still has to submit a permit application but can make an argument in the application that due to their location or the specific technology that they employ that they have no potential to discharge whether it be in extreme climatic instances or not. EPA provided some guidance but basically they feel this will be a high hurdle for an operation to overcome in order to not have to get a permit.
- Requires a nutrient management plan. Missouri currently has a form of a nutrient management plan but it doesn't contain all of the requirements that are required in the final rule. EPA intended that the comprehensive nutrient management plan if written for an operation could be used to fulfill the requirements for nutrient management plans.
- Requires that the nitrogen and phosphorus transfer potential had to be done for each individual field. Missouri currently only requires nitrogen application requirements.
- Allows phosphorus banking and requires annual manure testing and phosphorus tests on the fields every five years. The University and NRCS are currently working on a phosphorus index which might be available this spring. Mr. Kixmiller noted this may be an option for Missouri to meet this requirement for phosphorus application rates.

Commissioner Perry asked if the plan is to use an index rather than doing testing.

Mr. Kixmiller replied phosphorus testing on the fields is still required every five years. The index will give guidelines as to whether or not you can apply the manure to the field or how rotations would have to be done in order to stay within the phosphorus limits. EPA left it up to the states to determine how they regulate phosphorus application rates.

Commissioner Perry asked if this couldn't be a part of the nutrient management plan.

Mr. Kixmiller replied it's heavily tied in with the nutrient management plan. You have to use one in order to control the other. The phosphorus index is required as a component of the nutrient management plan and the nutrient management plan will have to consider phosphorus application rates.

- Establishes set back distances. Missouri's set back distances are different in many aspects. Missouri also doesn't have the 35-foot vegetative filter substitution in the set back limits.
- EPA also allowed innovative technology standards in the final rule. These innovative technology standards could allow a discharge from an operation. Missouri currently does not allow discharges from an operation except in the event of a 1-in-25 year rainfall event. Mr. Kixmiller explained these innovative technology discharges could also use multimedia trading whereas offsets to air emissions could be used to set increased discharge limits for the water discharge. EPA would like to be involved in the

multimedia trading and if Missouri considers this, it is likely EPA's offer of assistance will be accepted since this is a rather complicated process and not much explanation was included.

- New swine and poultry and veal lagoons will have to contain a 24-hour, 100-year rain event. Mr. Kixmiller noted this is different than the current standard of having to contain a 25-year, 24-hour rain event. This will probably be about one to two inches more lagoon capacity across the state. Due to the way the nutrient management plans will have to consider timing of their application rates, the farms may have to increase their storage capacities which could significantly affect producers.

Responding to Commissioner Perry's question, Mr. Kixmiller stated the nutrient management plan will have to be a little bit more involved than it has in the past. Staff previously considered the fact that you put on the amount of nitrogen that the plants can uptake in that year. Now the amount of nitrogen that the plants can uptake in a year and the amount of phosphorus that the soil can hold will have to be considered. You will have to consider that you time your nutrients so that you put them on the ground when the plants will need them and you also time them so that you don't apply them on frozen, saturated ground that may cause improper runoff and so forth. The nutrient management plan will have to be much more thought out. If row crops are being done, the manure has to be put on at times where the plants will be able to use it. Instead of having 180-day storage, it may have to be 270- or 365-day storage.

Commissioner Perry asked if a plan and actual records of application will be required.

Mr. Kixmiller replied there is a current requirement to keep records of the application. The final rule also requires them to keep records. There is also an annual reporting requirement that Missouri already requires. There are fairly minor differences in the final rule and Missouri's version. An annual report will have to be submitted showing how many animals they've had, how much manure was land applied and their land application rates.

Commissioner Perry asked if this will affect the LOAs.

Mr. Kixmiller replied as far as the final rule is concerned and EPA's delegation to Missouri, it does not have to affect the LOAs. Missouri's LOA program currently says that the farm is substantially in compliance with the permit requirements. If the permit requirements are changed, they will have to follow those standards.

### **Legal Matters**

#### **CWC Appeal No. 379 AK Steel Corporation Recommended Order Regarding Motion for Stay**

Ms. Neff reported AK Steel filed an appeal challenging certain conditions of their storm water permit along with a Motion for Stay and the matter was assigned to the Administrative Hearing Commission. Initially there was some argument between the parties concerning the Request for Stay, which was from the requirement to monitor PCB and TRC. The parties agreed to the stay because the hearing date is set for March 5, 2003. Ms. Neff stated the hearing officer recommended approval of the stay.

Commissioner Minton moved to **approve the Motion for Stay** regarding Appeal 379 as recommended by the hearing officer; seconded by Commissioner Perry and unanimously passed.

#### **CWC Appeal No. 376 City of Kansas City Todd Creek WWTF Dismissal**

Ms. Neff reported the City of Kansas City appealed an abatement order. The city has now decided to dismiss this appeal without prejudice due to the city and department agreeing that requirements of the abatement order have been satisfied. Ms. Neff asked the commission to dismiss the appeal without prejudice.

Commissioner Minton moved to **dismiss without prejudice Appeal 376** as requested by the appellant; seconded by Commissioner Kelly and unanimously passed.

#### **303(d) List Methodology Rule**

Ms. Shannon reported when the 303(d) List was discussed at the August commission meeting, the commission directed staff to proceed with development of a rule for the methodology used in developing the 303(d) List. EPA is still developing a rule that will potentially affect the state's methodology and the date that the 303(d) List is to be submitted. Ms. Shannon stated staff has developed the methodology rule but she needs guidance from the commission on whether to move forward at this time.

EPA is still moving forward with its rule and it is likely this rule will impact the methodology staff uses to develop the 303(d) List. Staff has tried to incorporate by reference EPA's rules so that the state's rule would not need to be revised. Ms. Shannon noted she has significant concerns that the state's rule will be impacted by EPA's action. The other issue is that the 303(d) List is due in April 2004. The EPA rule that has not yet been proposed would allegedly change the due date to 2006. Moving forward with the rule now might be premature if this due date changes. The content of EPA's rule will potentially affect the

state's rule. The rulemaking process is such that the methodology rule and then the 303(d) List rule will not be effective prior to the due date of April 1, 2004. Ms. Shannon noted she does not believe this is a significant issue because history with EPA is that if we are moving forward with the process on the 303(d) List, EPA will accept it a little bit late. There are a number of uncertainties the commission needed to know about before moving forward with the rulemaking.

Commissioner Minton asked how long it might be before EPA completes its rule.

Ms. Shannon responded it was supposed to be published in December (2002). The latest information is that it was to have been submitted to OMB on January 15 but confirmation has not been received on that. If that is the case, it will be about 30 days before it becomes public. Ms. Shannon stated when EPA did this in 2000, even though the major rule was out for public comment, they changed the due date of the 303(d) List.

Commissioner Perry noted her concern is that if staff's methodology is very different from EPA's then issues are going to be confused like they were in 1998 and 2002. She asked if it would be appropriate to table until February 26 when more information might be available.

Ms. Shannon replied the only negative impact of that is because staff has to do two rulemakings, if the due date remains April 2004, that will push it further from that due date.

Commissioner Perry asked if the public comment for one could overlap the other.

Ms. Shannon replied there's not much opportunity for overlap.

Commissioner Perry asked if it is possible to do this if we wait until February.

Ms. Shannon responded either way the April 1, 2004 deadline will probably not be met. Staff expects this to change to 2006 and in 1998 EPA was willing to accept a late submittal seeing that the process to move forward was being followed.

Commissioner Minton stated the commission will have to move forward if there is no better idea of what EPA is going to do by the February meeting.

Mr. Hull noted there is proposed legislation that would make the rulemaking process even more arduous as far as risk benefit analysis and so forth.

## **Other**

### **Future Meetings**

The commission scheduled meetings for April 23 and June 11, 2003.



### **Planning**

Commissioner Minton asked that an item be placed on the February commission meeting agenda, or shortly thereafter, regarding policy, strategies, objectives and goals. He stated there are many issues that need follow-up such as nationwide permits, 303(d) List and rulemaking, and the White River Basin group. Commissioner Minton noted he would like to be able to see what was initiated, where we are going, and where we fell short at the end of the year. This will give the citizens an opportunity to know where the commission is going and to have some input. Commissioner Minton stated priorities may need to be established due to the budget shortfall.

Commissioner Perry noted she believes the commission is statutorily mandated to present a plan for how to handle the water resources.

Commissioner Minton stated this information will enable the commission to know where staff is going throughout the year.

Commissioner Perry noted she is a member of a board that has given each of the committees a one page list of goals, milestones, and dates by which it is anticipated the milestones will be met. This would be a report card to look back on.

Mr. Hull noted it can be a list of what staff can feasibly do. There are so many expectations of staff that cannot be met due to the volume of work. The budget is also impacting staff. The potential for closing of the Jefferson City Regional Office will also necessitate changes.

Commissioner Minton noted the commission would know what staff is focusing on and the problems staff are having if they are provided this information.

Mr. Totten reported the department will be meeting with EPA in March to discuss federal and state priorities. Mr. Mahfood has directed Water Protection and Soil Conservation Division and Geological Survey and Resource Assessment Division to be proactive in working together and overlapping issues.

Responding to Mr. Hull's question, Ms. Shannon stated 34 TMDLs are to be completed.

Mr. Totten noted the web site lists stream segments and it doesn't match with the TMDLs.

Mr. Hull noted this needs to be clarified on the web site. Completing TMDLs is another item that has to be completed next year and staff may not be able to complete these.

Commissioner Minton stated if there is an outline of things that staff is working toward that will be helpful.

There being no further business to come before the commission, Chairman Herrmann adjourned the meeting at approximately 4:55 p.m.

Respectfully submitted,

Jim Hull  
Director of Staff